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Lessons Learned: Watch What You Say; It Can And Will Be Used Against You

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As employment litigators, we frequently remind our clients that extreme caution must be exercised with email communications. A recent decision by the Seventh Circuit in *Arroyo v. Volvo Group North America, LLC* serves as a powerful reminder.

Luz Maria Arroyo was an Army reservist who, between 2005 and 2011, deployed twice to Iraq and Kuwait for periods in excess of one year each and also regularly attended weekend drills, as well as annual and other military training. Although her supervisor and others expressed frustration from time-to-time over Arroyo's absences – especially her time off associated with her travel back and forth between Joliet, Ill., (where she worked for Volvo) and Ft. Benning, Ga., (where her military unit was based) – Volvo excused all of her absences that were connected to her military duty (as well as other absences in connection with post traumatic stress disorder, which Arroyo apparently developed after her second deployment).

Nevertheless, Volvo ultimately terminated Arroyo's employment in 2011 after an audit of her attendance record revealed that Arroyo had exceeded the maximum number of allowable absences in a six-month period. Arroyo then sued, claiming violations of the Uniformed Services Employment and Reemployment Rights Act (among other violations). The district court granted summary judgment for Volvo on all counts.

In reversing the district court's grant of summary judgment on the USERRA claim, the Seventh Circuit determined that several emails – coupled with comments to Arroyo about her military duty creating a hardship for the company and pressure to transfer to a military unit closer to Joliet – created a "convincing mosaic" from which a reasonable jury could infer discriminatory motive, which shifted the burden to Volvo (under USERRA) to prove that it would have fired Arroyo even absent her military service. Even though Volvo identified five other employees it had disciplined for attendance violations similar to Arroyo's, and had terminated one of the five, the Seventh Circuit concluded that Volvo had failed to "conclusively establish that it necessarily would have terminated Arroyo for her tardiness."

The lesson learned here with respect to emails is a simple one, yet it is one that is often ignored: Be mindful that everything you write in an email can and will be read and challenged. In this case, the emails – only two of which appear to have been written in 2010 – primarily sought advice on how to handle Arroyo's numerous absences. But what appears to have troubled the Seventh Circuit was the frustration with Arroyo's absences also expressed in

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the emails, including one that came right out and said that “[Arroyo] is really becoming a pain with all this.” The other lesson here is more subtle as the Seventh Circuit did not really explain why it found Volvo’s evidence insufficient to establish that it would have terminated Arroyo anyway, even absent her military service.

Before you terminate an employee who has engaged in protected activity, you would be well-advised to not engage in any activity – such as a one-off audit of an attendance record – to find a reason to terminate the employee. Instead, apply your policies uniformly and let the chips fall where they fall.